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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 572

THE CREEK NATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 6–11, 18) is reported in 92 C. Cls. 346.

JURISDICTION

The judgment of the Court of Claims sought to be reviewed was entered on June 2, 1941 (R. 18). The petition for a writ of certiorari was filed August 30, 1941. The jurisdiction of this Court is invoked under section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. sec. 288.

QUESTION PRESENTED

Whether the Creek Nation is entitled to recover compensation in the Court of Claims for tribal lands and funds allocated to some 2,000 persons whom the Dawes Commission and the Secretary of the Interior are alleged to have erroneously placed on the Creek rolls.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in chronological order in the appendix.

STATEMENT

Petitioner brought this suit in the Court of Claims to recover just compensation for 320,000 acres of tribal lands, and for an accounting of tribal funds, which were allocated to some 2,000 persons who, it is alleged, should not have been placed on the membership rolls of the Creek Nation. Petitioner's first and second amended complaints have been dismissed upon demurrer (R. 11, 18).

The allegations of the second dismissed complaint (R. 11–18) may be summarized as follows:

Congress in 1898 enacted legislation to wind up the affairs of the Creek Nation by distributing the Creek lands and other communal property in severalty among the members of the Creek Nation. Curtis Act of June 28, 1898, 30 Stat. 495,

497. By the terms of this Act, as subsequently amended, each Creek citizen was to receive 160 acres of land. If the appraised value of the land selected was less than $1,040.00, the Creek was to receive additional land or money to absorb the difference. Any remaining surplus lands were to be disposed of and the proceeds distributed per capita among the members of the tribe. Act of March 1, 1901, 31 Stat. 861, 862, 870; Act of June 30, 1902, 32 Stat. 500.

Since the distribution could not be effected until the membership of the tribe was determined, the previously created Dawes Commission was directed "to make correct rolls of the citizens by blood of * * * [the Creek Nation], eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made." Act of June 28, 1898, 30 Stat. 495, 502. The Commission was also directed to prepare a roll of the Creek freedmen. In preparing these rolls the Commission was to have access to all rolls and records of the tribe, and to adopt such other means as might be deemed necessary to accomplish their task. The Act further provided that "the rolls so made, when approved by the Secretary of the Interior, shall be final * * *" Act of June 28, 1898, 30 Stat. 495,502.

After citing and summarizing the foregoing statutes, the complaint alleges (R. 14–15) that the Creek Nation was required to turn its records over to the officers and agents of the defendant, and that these officers in violation of law added "the names of some 2,000 persons who were not entitled to share in the property of said Nation." More specifically, defendant's officers "made erroneous enrollments of citizens of plaintiff who were not living on April 1, 1899, made erroneous enrollments of persons who were non-citizens of plaintiff tribe, made duplicate and triplicate enrollments of one and the same person, made erroneous enrollments of children of citizens in violation of said laws governing such enrollments, and made many other errors as the proof herein will definitely show" (R. 15).

The complaint further alleges that the tribal authorities were refused the right to inspect the rolls while they were being compiled, that the rolls were kept secret until after they became final and irrevocable on March 4, 1907, and that as a result 320,000 acres of land and a large amount of tribal funds were distributed among some 2,000 persons who should not have been included on the tribal rolls (R. 15–16).

The petition then alleges that "during the time of said enrollment and allotment" the officers of the defendant "were guilty of misconduct unbecoming to their duties as trustees" of the Creek

Nation; more particularly, that the chairman and several other members and employees of the Dawes Commission organized a trust company chartered to deal in Indian lands, that this company acquired space in a building, the first floor of which had been used by the Dawes Commission prior to their removal to the second floor, that the company was "thus given a seeming official status," and that the officers of this company used the information from the tribal rolls (which they had before them as employees of the Dawes Commission) to further their own personal interests and the interests of the land company "to the disadvantage of plaintiff, and in disregard of their duties" under the Creek agreements (R. 17).

The complaint further states that "the defendant had knowledge, or means of knowing, the extent of said erroneous enrollments, and, although having ample means properly to correct the same, yet did not do so, but instead permitted said erroneous enrollments to stand until they became irrevocable, thus confirming said wrongs to plaintiff and prejudicing the rights of plaintiff to its lands so wrongfully allotted to said erroneous enrollees" (R. 17).

Petitioner therefore concludes that "the lands, money, and property of the Creek Nation were taken and confiscated by the United States without just compensation or due process of law, and

in violation of the rights of plaintiff guaranteed to it by the Fifth Amendment," and accordingly requests that the tribe recover from the United States the full value of the lands and property thus taken (R. 17).

ARGUMENT

A. Petitioner contends that the allocation of tribal funds and land amounted to a "taking" by the United States of tribal lands and funds for which it must make just compensation to the Creek Nation (Pet. 5, 12, 21). But the distribution complained of was made in accordance with the Creek membership rolls prepared by the Dawes Commission, and it has been settled by this Court that "the enrollment of a member of an Indian tribe by the Dawes Commission, when duly approved [by the Secretary of the Interior], amounts to a judgment in an adversary proceeding determining the existence of the individual and his right to membership." *United States* v. *Atkins*, 260 U. S. 220, 225–226; *Campbell* v. *Wadsworth*, 248 U. S. 169, 173–174; *United States* v. *Ferguson*, 247 U. S. 175, 178; *United States* v. *Wildcat*, 244 U. S. 111, 116–119.

Therefore, unless the adjudications of the Dawes Commission placing persons on the tribal rolls are successfully impeached, there has been no "taking" for which compensation could be due. The adjudications, like the judgments of other judicial or quasi-judicial tribunals, can at the most

be impeached in only two ways: (1) in direct proceedings where the facts are such as to warrant intervention by a court of equity (*United States* v. *Atkins,* 260 U. S. 220, 226; *United States* v. *Wildcat,* 244 U. S. 111, 116, 120); and (2) in collateral proceedings for fraud, collusion, or lack of jurisdiction (1 Freeman on Judgments (5th ed. 1925) sec. 318). To permit impeachment of the Creek rolls by other means than these traditional grounds for impeachment of judgments would violate the mandate of Congress declaring these rolls to be "final." Act of June 28, 1898, sec. 21, 30 Stat. 495, 503; Act of March 1, 1901, sec. 28, 31 Stat. 861, 870; Act of June 30, 1902, sec. 9, 32 Stat. 500, 502.

It is submitted that the dismissed complaint does not allege facts warranting a reexamination by the Court of Claims of the membership rolls of the Creek Nation:

1. Petitioner erroneously urges that the instant suit "is a direct attack upon the enrollments made by the Dawes Commission" (Pet. 17). This is not a direct proceeding by the Creek Nation to remove any names from the Creek Rolls, nor is it a suit to cancel any wrongfully issued patents. A suit for that purpose would have required the joinder of the enrollees, their heirs, and grantees. *Garfield* v. *Goldsby,* 211 U. S. 249, 262–264; *United States* v. *Wildcat,* 244 U. S. 111, 116, 125. These persons have not been joined.

The tribal rolls are only "incidentally involved" (Pet. 21); the primary purpose of the present proceeding is to obtain relief other than the reformation of the tribal rolls and the cancellation of the resulting patents. The suit, therefore, is clearly a collateral attack on the adjudications of the Dawes Commission. 1 Freeman on Judgments (5th ed. 1925), p. 607. Consequently *Tiger* v. *Twin State Oil Co.*, 48 F. (2d) 509 (C. C. A. 10), relied on by petitioner as in conflict with the decision below (Pet. 9–10, 17), is not in point, since that case was a direct attack in a court with equitable jurisdiction to grant the relief there sought, with all interested parties present.[1]

2. As a collateral attack on the determinations of the Dawes Commission, the instant suit must fail. Collateral impeachment, even by a third party (Pet. 22), is constricted to narrow limits. One who seeks collaterally to impeach must show more than mere errors and irregularities. *Secrist* v. *Green*, 3 Wall. 744, 751; *Gregg* v. *Forsyth*, 24 How. 179. The *Wildcat* case, 244 U. S. 111, 118, 120, 124–125, cited by petitioner to sustain the broad proposition that the adjudications of the Dawes Commission may be impeached for "mis-

[1] For the same reason, *Kemohah* v. *Shaffer Oil & Refining Co.*, 38 F. (2d) 665, 667–668 (N. D. Okla.), and the quotations from Freeman on Judgments relied on by petitioner (Pet. 26) are inapplicable.

take," was a direct attack in a court of equity, and the Government there contended that an individual's enrollment was erroneous, that his name should be removed from the rolls, and his allotment certificate canceled (p. 114).[2] That case casts no doubt on the general rule that collateral attacks, even by a third person, are permitted

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[2] The *Wildcat* case makes it clear that a conclusion which is simply erroneous is not enough to support even a direct proceeding. Referring to the determinations of the Dawes Commission, this Court there said (pp. 118–119):

> A correct conclusion was not necessary to the finality and binding character of its decisions. It may be that the Commission in acting upon the many cases before it made mistakes which are now impossible of correction. This might easily be so, for the Commission passed upon the rights of thousands claiming membership in the tribe and ascertained the rights of others who did not appear before it, upon the merits of whose standing the Commission had to pass with the best information which it could obtain.
>
> When the Commission proceeded in good faith to determine the matter and to act upon information before it, not arbitrarily, but according to its best judgment, we think it was the intention of the act that the matter, upon the approval of the Secretary, should be finally concluded and the rights of the parties forever settled, subject to such attacks as could successfully be made upon judgments of this character for fraud or mistake.

Some of the difficulties which the Dawes Commission encountered in enrolling the members of the Five Tribes are outlined in the Commission's report for 1905. H. Doc. No. 5, pt. I, 59th Cong., 1st sess. (Ser. No. 4959), pp. 579–640, particularly pp. 582–583, 601–606.

only where the tribunal was without jurisdiction or where the judgment was obtained by fraud or collusion. 1 Freeman on Judgments (5th ed. 1925) sec. 318. Petitioner has not brought itself within either of these exceptions.

Clearly the Dawes Commission had jurisdiction to determine whether the names in question should be placed on the membership rolls of the Creek Nation. It decided that they should be, and the Secretary of the Interior agreed.

Nor is there a sufficient allegation of fraud or collusion. Even assuming *arguendo* that the Court of Claims has jurisdiction under the 1924 Act to determine which names were fraudulently or collusively placed on the Creek rolls,[8] it should not be required to undertake such an examination in the absence of a clear and explicit allegation of fraud or collusion. The complaint contains no such allegation. A broad averment (para. IX, R. 15) that 2,000 names were placed on the rolls "contrary to the terms of said Curtis Act and Creek Agreements, and in violation of the con-

[8] A grant of jurisdiction to the Court of Claims to adjudicate "all legal and equitable claims" of the Creek Nation (Act of May 24, 1924, 43 Stat. 139) does not mean that the court can go behind a treaty, a release, or judgment to ascertain whether it was procured by fraud, and on the basis of that determination decide that the tribe has an "equitable claim" against the United States. *Klamath Indians* v. *United States*, 296 U. S. 244, 250; cf. *McClure* v. *United States*, 116 U. S. 145, 150.

tract with plaintiff" is a mere conclusion of fact, if not of law. It does not show fraud. Such errors could have been the result of honest mistakes of law or fact, unreviewable in a collateral proceeding.

Similarly the allegations (pars. X–XII, R. 15–16) that the tribal officers were denied access to the rolls while they were being compiled does not show fraud or collusion, or a denial of due process (Pet. 21–26). Congress placed on the Commission, and not the tribe, the duty of preparing "correct rolls." The Creek Nation in the Agreement of 1901 (31 Stat. 861) and the Supplemental Agreement of 1902 (32 Stat. 500) consented to this method of determining tribal membership. Neither agreement provided for participation by the tribe in this determination. This omission is significant in view of the fact that these same agreements expressly provided for tribal participation in the appraisement proceedings. Act of March 1, 1901, sec. 2, 31 Stat. 861, 862; Act of June 30, 1902, sec. 2, 32 Stat. 500. The allegations, then, do not even show the violation of a legal right, much less a fraudulent enrollment of persons not entitled to participate in the distribution of tribal property (see R. 10–11).

The only paragraph which is at all susceptible of being construed as alleging fraud or collusion is paragraph XIV (R. 16). There the petitioner

alleges that the officers of the defendant "were guilty of misconduct unbecoming to their duties as trustees of said Creek Nation in carrying out the agreements with plaintiff." But "misconduct" is not necessarily "fraudulent or collusive conduct." Nor is this vagueness cured by allegations that members and employees of the Dawes Commission organized a trust company to deal in Indian lands, and that they "used the information from the said rolls * * * to further their own personal interests * * * to the disadvantage of plaintiff, and in disregard of their duties." Whatever the gravity of this allegation of fraud, it does not go to the propriety of the rolls themselves. It does not allege fraud or collusion in the preparation of the rolls, but alludes simply to information obtained from the rolls. The court below, in dismissing the first petition, made it clear that an allegation of "errors and irregularities," as distinguished from "fraud," was not enough (R. 9). Petitioner's persistence in its second amended complaint in alleging "errors and irregularities" rather than "fraud" must be construed as admission on its part that no fraud existed or at least that no fraud can be shown. In the absence of more specific allegations the determinations made by the Dawes Commission must stand, and so long as they stand there has been no "taking" for which the Government is liable (R. 9).

B. While the Court of Claims dismissed the complaint on the ground that the adjudications of the Dawes Commission could not be collaterally attacked in the absence of an explicit allegation of fraud, we believe it plain that, even if these rolls were to be re-examined and petitioner's allegations sustained, the United States would not be obligated to pay just compensation under the Fifth Amendment.

This is not an instance in which the United States, departing from the role of guardian, has treated tribal property as government property. *Lane* v. *Pueblo of Santa Rosa,* 249 U. S. 110, 113. In such case, the United States assumes an obligation to make just compensation, whether it appropriates the property for itself, *United States* v. *Mille Lac Chippewas,* 229 U. S. 498, 509–510, or for others. *United States* v. *Creek Nation,* 295 U. S. 103, 110–111; *Shoshone Tribe* v. *United States,* 299 U. S. 476, 495; *United States* v. *Klamath Indians,* 304 U. S. 119, 123. Here the Government did not purport to treat the property as its own. It made no conveyance of the lands. It merely approved patents which were issued by the tribe itself, and distributed funds to persons whose names appeared on the approved rolls of the Creek Tribe. This action did not constitute a "taking" within the meaning of the *Creek, Shoshone,* and *Klamath* cases upon which petitioner relies (Pet. 15–17). Cf. Gov-

ernment's briefs in opposition in *Seminole Nation* v. *United States,* No. 815, October Term 1940, pp. 6–9; *Creek Nation* v. *United States,* No. 957, October Term 1940, pp. 8–9.

CONCLUSION

The decision of the court below is correct and presents no conflict of decisions. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1941.